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Privatization: Is International Law Relevant?

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Privatization: Is International Law Relevant?

OVER THE YEARS much has been written concerning the taking of property by the state through confiscation, expropriation, and more generally nationalization from an international law point of view.¹ By contrast, there is a dearth of authority on the subject of denationalization, or privatization as it is called today.²

The rolling back of nationalization that first took hold in Britain a few years ago has gained momentum as Canada and France have decided to return many state-owned enterprises to the private sector. The objective is clear, but the methods to accomplish it are not uniform, nor is it certain that all states concerned desire to achieve popular capitalism. Thus, foreign multinational corporations as well as institutional investors may be interested in acquiring these state-owned enterprises. This possibility raises the question of whether they will be given an opportunity to do so, as the privatizing law may forbid or limit foreign ownership. Furthermore, a question of valuation arises. In this connection can state-owned enterprises be sold at less than their value, especially to foreign purchasers? Does international law have anything to say concerning these matters? In other words, should there be a parallel between nationalization and pri-

¹ In general see J.-G. Castel, *International Law Chiefly as Interpreted and Applied in Canada* C. 12 (3rd ed., 1976); J.-G. Castel, *Canadian Conflict of Laws* C. 25 (2nd ed., 1986); S. Williams and A. de Mestral, *An Introduction to International Law Chiefly as Interpreted and Applied in Canada* C. 6 (2nd ed., 1987); S. Friedman, *Expropriation in International Law* (1953); R. Lillich (ed.), *The Valuation of Nationalized Property in International Law* (1972).

² At the time of writing (December 1986), a few scholarly articles dealt with the domestic law or economic aspects of privatization.

vatization? Are there any international treaties that are applicable?³ Antitrust issues may also be involved where the state-owned enterprise to be sold has a complete monopoly or is in a position to abuse its dominant market position once it is deregulated. Another issue is whether approval of the sale to foreign investors must be obtained, in other words whether, in Canada, for instance, the procedures found in the Investment Canada Act must be followed.⁴ What is the situation if the state-owned enterprise has foreign subsidiaries?

Evaluation is difficult when the state-owned enterprise has a monopoly. How can you establish full market value? Would sale through the stock exchange reflect such value? The price that purchasers are willing to pay may be low if they fear that a subsequent government will renationalize the enterprise.

In France the law on privatization⁵ provides for the sale to the private sector of sixty-five state-owned enterprises over the next five years. The sale must not be at a price less than the actual value of the enterprise, as otherwise the principle of equality among citizens found in the French constitution would be violated. Thus payment by investors will have to be full, prompt, and effective, paralleling the American-supported international standard in case of nationalization. Article 10 of the Law of implementation⁶ states that "whatever the method of transfer, the total amount of shares transferred directly or indirectly by the state to physical or legal persons

³ See, for instance, Treaty Establishing the European Economic Community Art. 3(c) (Office for Official Publications of the ECC, Luxembourg, 1973). According to Art. 67(1), member states are bound to the extent necessary for the proper functioning of the Common Market, to abolish "restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or the place of residence of the parties or on the place where such capital is invested." There are escape clauses permitting suspension of the liberties promised by the treaty but they are subject to decisions of the Council of the Community: see Art. 73. According to Art. 221, member states must accord nationals of the other member states the same treatment as their own nationals as regards participation in the capital of companies and firms. Could the European Convention on Human Rights be applicable? For cases involving nationalizations, see *Lithgow and Others v. United Kingdom* (1984), 7 E.H.R.R. 56, where the European Commission of Human Rights stated that conditions laid down by national law for the taking of property must be in line with the requirements of the Convention. For text of Convention and Protocols, see I. Brownlie, *Basic Documents in International Law* 194 (1967).

⁴ Investment Canada Act, S.C. 1984-85, c. 15, s. 14 *et seq.*, and see *infra* note 8.

⁵ 86-793, 2 juillet 1986, J.O. 3 juillet 1986, at 82401.

⁶ 86-912, 6 août 1986, J.O. 7 août 1986, at 969.

who are foreigners or under foreign control, cannot exceed 20% of the capital of the enterprise. . . ." Does this provision violate international law or is it a legitimate way to protect the French national interest? It would seem that the sovereign right of the privatizing state to determine its economic order recognized by the Charter of Economic Rights and Duties of States⁷ allows restrictions as to foreign ownership. The privatizing state having had a legitimate right over the wealth of the nation when it expropriated the foreign or domestic-owned enterprise can rightfully restrict the way in which it returns it to private ownership. Selling state assets to its nationals does not amount to a transfer of ownership subject to international law, as the transfer is between the nation and its members. This would also be the case where the state enterprise to be sold had never been nationalized. Thus, there is no obligation to sell to foreign investors.

Constitutional law problems, such as the legitimacy of privatization, may arise. The traditional parliamentary claims for overall legitimation may not be sufficient to justify the process, especially in Great Britain. This is not the case in Canada, where there is a written federal constitution or in France where the Conseil Constitutionnel when consulted can declare the law or some of its provisions unconstitutional and thus provide constitutional legitimacy before the law comes into force.

In Canada, the new Minister of State for Privatization has to decide how Crown corporations can be transferred to the private sector. A task force of six cabinet members makes the final decision on each sale on a case by case basis. It is a pragmatic approach in which factors like turnovers, market conditions, and long-term employment opportunities are given more weight than the ideological goal of selling government assets. When the sale of a Crown corporation is made to foreign investors scrutiny by Investment Canada is not required.⁸

Could it be argued that the former owners should have priority in the case of privatization, at least to the extent of their former holdings, and if they were not adequately compensated for their taking

⁷ Dec. 12, 1974, 3281 (XXIX): Arts. 1, 2.1, and 2.2. J.-G. Castel, A. de Mestral, W. C. Graham, *International Business Transactions and Economic Relations* 13 *et seq.* (1986).

⁸ Investment Canada Act, *supra* note 4, s. 10(1)(f). The sale price could be set by applying the rules found in the Expropriation Act, R.S. 1970, c. 16 (1st Supp.), as amended ss. 23-27. In Ontario, see the Expropriations Act, R.S.O. 1980, c. 148, as amended, s. 13 *et seq.*

at the time of nationalization, that this factor should be taken into consideration? Should the citizenship of the former owners at the time of privatization be relevant? The method of valuation used for nationalization would seem to be important with respect to valuation for privatization. What if a lump sum settlement was accepted by the former owners?

These are some of the issues that come to mind when considering the various methods of privatization of state-owned enterprises in the light of the controversial international law rules⁹ applicable to the nationalization of foreign-owned enterprises.

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⁹ What the international rules are today is much debated. See, for instance, *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v. Libya* (1977), 53 I.L.R. 389; (1970), 17 Int'l Leg. Mat. 1.

Sommaire

La privatisation : le droit international est-il pertinent?

L'adoption par plusieurs États, dont le Canada, de lois relatives à la privatisation (ou dénationalisation) de certaines entreprises appartenant à la collectivité et destinées à encourager le partenariat populaire, pose des problèmes de droit international concernant le transfert de propriété du secteur public au secteur privé. Ces problèmes sont engendrés par la présence dans ces lois de dispositions limitant à un certain pourcentage le nombre d'actions pouvant être acquises par des étrangers et qui ont essentiellement pour objet de préserver l'indépendance nationale.

L'auteur soutient que les privatisations doivent, en principe, obéir aux mêmes règles et respecter les mêmes conditions que celles exigées par le droit international en matière de nationalisations, dans la mesure où ces règles et conditions seront adaptées à la situation particulière des privatisations.